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IN THE COURT OF APPEALS OF INDIANA

CHRISTA D. SAIN,)
Appellant-Defendant,)
VS.) No. 71A05-0606-CR-304
STATE OF INDIANA,)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT The Honorable Roland B. Chamblee, Jr., Judge Cause No. 71D08-0506-FB-61

February 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Christa D. Sain appeals her convictions for Robbery,¹ as a class B felony, Residential Entry,² a class D felony, and Possession of Marijuana,³ a class A misdemeanor. She presents the following restated issues for review:

- 1. Did she receive ineffective assistance of trial counsel?
- 2. Did the trial court err in refusing Sain's proffered instruction on the crime of theft?

We affirm.

After midnight on June 19, 2005, Sain was working as a waitress at the Torch Lounge in South Bend when she met Rafael Salinas, who was at the bar with his cousins. Sain agreed to "hang out" with Salinas after work. *Transcript* at 193. Sain eventually drove Salinas to his house around 4:00 a.m. According to Salinas, Sain dropped him off and did not come inside.⁴ Salinas went inside and told his fifteen-year-old nephew, Estevan Garcia, to go to bed. The intoxicated Salinas then went to his upstairs bedroom, undressed, and "passed out." *Id.* at 194.

On her drive home to Niles, Michigan, Sain apparently looked in the front console of her vehicle and discovered that the money she made the previous night (approximately two or three hundred dollars) was missing. Believing Salinas had stolen the money, Sain

¹ Ind. Code Ann. § 35-42-5-1 (West 2004). The offense was elevated from a class C felony to a class B felony because it was committed while armed with a deadly weapon. We note further that Sain was charged, tried, and convicted of robbery under an accomplice liability theory. Ind. Code Ann. § 35-41-2-4 (West 2004).

² Ind. Code Ann. § 35-43-2-1.5 (West 2004).

³ Ind. Code Ann. § 35-48-4-11(1) (West 2004).

⁴ Sain, on the other hand, claimed she went inside to smoke marijuana with Salinas and then left.

called at least one male friend for assistance and then returned to Salinas's house to confront him. She entered the house through a closed but unlocked door sometime prior to 6:00 a.m. and went up to Salinas's bedroom, where he was sleeping. Salinas awoke to Sain screaming at him from his bedroom doorway. Sain accused him of robbing her and told him that she wanted her stuff back. Salinas denied the accusations and told her to leave. She continued to scream and then slapped him and ran downstairs. Sain stood in the kitchen, still yelling about being robbed. At this point, Salinas's two nephews, Estevan and Kenny, who had been sleeping in the living room, were awake. Salinas once again told Sain to leave and walked her to the front door.

Sain opened the front door and "started screaming really loud about what do you mean you hate niggers, what do you mean you hate blacks." *Id.* at 195. At that point, two men exited a car parked on the street and entered the house. One was armed with a shotgun and the other had a baseball bat. The gunman pointed his shotgun at Estevan and Salinas and told them not to move. He then asked where all the dope was, as Sain went upstairs. Salinas was taken to his bedroom by the gunman, while the man with the bat stayed with Salinas's nephews. In the bedroom, Sain was collecting Salinas's belongings into a pile that included, among other things, a necklace, a stereo, a Playstation, shoes, and blankets. The gunman directed Sain to take certain items and asked Sain "where is all the dope at". *Id.* at 197. Sain said she did not know and then walked out the door with Salinas's property and took it to her car. The gunman walked Salinas back down to the living room, where he once again asked about drugs. Salinas responded that he did not have any drugs. The gunman told Salinas that Sain had indicated there was "a bunch

of dope". *Id.* at 198. The gunman asked, "well, where is all the money at, she also said you robbed her." *Id.* Salinas denied taking her money. The gunman replied, "then we have to take something." *Id.* The gunman proceeded to take Salinas's cell phone and to direct the man with the bat to take Salinas's identification. He also ordered Salinas to give Sain, who had since returned from her car, the money in Salinas's wallet. Salinas opened his wallet, and Sain reached inside and took the money. She then left and drove away in her car. After threatening to beat Salinas, the two men also left.

Estevan immediately called the police and reported what had occurred. Sain's vehicle was located and stopped soon thereafter, within a mile of the residence. A bag of marijuana was found in plain view on the passenger seat, and two other bags of marijuana were later found in Sain's car.⁵ Officers found \$661 in her purse, and the items taken from Salinas were found in the trunk of her car. Salinas's nephews came to the scene of the stop and identified Sain. When Sain was later searched at the police station, an additional \$100 was found in her bra.

Sain made an initial statement to the arresting officer after being informed of her rights. Sain explained that she returned to Salinas's home because she believed he had stolen money from her. She said she called a couple of friends for backup. According to Sain, a man named J.R. entered the residence with a baseball bat and another unnamed man entered with a shotgun. "[A]fter about that much information, [Sain] kind of stopped and hesitated...she took a break, stalled and cried a little bit." *Id.* at 261. After

⁵ The three bags of marijuana weighed a total of fifteen grams and had a street value of about \$1000.

she composed herself, Sain explained to the officer that "she ha[d] a baby with one of the gentleman [sic] that was there with her" and she did not "really want to get them in trouble". *Id*.

About an hour after the stop, Sain gave a statement to Detective Scott Moniz at the scene. In this recorded statement, Sain admitted returning to Salinas's home and stealing his property because she believed he had taken money out of her car. She also acknowledged that she called a man named J.R. for assistance and that he entered the house with a baseball bat. Sain provided no identifying information about J.R. and indicated that she called him because he was a shady person. During this statement, Sain denied any knowledge of the presence of a man with a shotgun at Salinas's house. She made comments, however, that could be interpreted as an indication that a third individual was involved.⁶

On June 22, 2005, the State charged Sain with robbery while armed with a deadly weapon, a class B felony, residential entry, a class D felony, and possession of marijuana, a class A misdemeanor. At trial, defense counsel, Patrick McFadden, acknowledged that Sain had committed crimes, but argued she had not committed armed robbery or residential entry. McFadden also attacked the credibility of Salinas and implied that Salinas had instigated the episode by stealing from Sain. At the conclusion of the trial, McFadden proffered an instruction on theft, which the trial court rejected. The jury

⁶ Two days later, Sain gave a similar statement to another detective in which she provided vague information about J.R. and denied seeing a gunman in the house.

found Sain guilty as charged. She now appeals. Additional facts will be provided below as necessary.

1.

Sain initially claims she was denied the effective assistance of counsel at trial. In this regard, Sain argues counsel's representation fell below an objective standard of reasonableness when he told the jury she was guilty of the crimes alleged, when he failed to make proper objections, and when he failed to effectively prepare for trial.

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution, which "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). The benchmark for judging any claim of ineffectiveness, therefore, must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Taylor v. State*, 840 N.E.2d 324.

In order to prevail on her claim of ineffective assistance of counsel, Sain must demonstrate both that her counsel's performance was deficient and that she was prejudiced thereby. *French v. State*, 778 N.E.2d 816 (Ind. 2002); *see also Taylor v. State*, 840 N.E.2d 324 (the failure to satisfy either component will cause an ineffective assistance claim to fail). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816. To establish the requisite prejudice, Sain must show there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002).

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. When a claim for ineffective assistance of counsel is based on counsel's failure to object, the defendant also must show that a proper objection would have been sustained.

Id.

We initially address Sain's bald allegations that McFadden failed to make proper objections during trial and failed to prepare for trial. In this regard, Sain apparently claims that counsel failed to object to the admission of her recorded statement and failed to review the redacted version of her statement prior to its admission at trial. There is simply no merit to these claims of deficient performance. First, Sain has not even attempted to establish that any objections would have been sustained.⁷ Second, it is clear from the record that McFadden

Without citation to authority or analysis Sain simply asserts:

[[]H]ad defense counsel objected to the taped statement on *Miranda* grounds, the tape may not have been admitted into evidence and the jury may have come to a different conclusion. As well, had the jury been allowed to hear the original version of the Defendant's tape-recorded statement, the results may have been different.

Appellant's Brief at 16. Sain then proceeds to make the following statement: "By failing to object to the redacted portion, the jury was able to consider evidence that may have otherwise been prohibited." *Id.* Surely, it should go without saying that the purpose of the redaction was to

and the prosecutor had an off-the-record discussion regarding the redaction⁸ and there is no indication in the record that McFadden failed to review the redacted and/or original statement prior to its admission.

Sain also complains that McFadden failed to adhere to "[b]asic rules of conduct and courtroom etiquette". *Appellant's Brief* at 7. In particular, Sain directs us to comments made to prospective jurors during voir dire. McFadden began his introduction as follows:

My name is Pat McFadden, and I apologize for jumping up. I have a character defect. There are many of them as the Judge is well aware of, and I have a tendency to react rather than respond, to jump up and not think before I do things. And for that, I will try not to do that....

Transcript at 95. McFadden also made the following statement to the venire to which Sain now takes issue:

This is serious business, folks. But, you know what, I think – this is going to be a fun trial because this is going to be like on TV kind of because

keep improper evidence from the jury. Thus, it cannot be said that the redaction allowed the jury to consider evidence that may have otherwise been prohibited.

The following discussion took place outside the presence of the jury:

[State]: With Detective Moniz, we're going to be playing a statement that he took from the defendant, an interview. There was one statement in the original recording that I believe would be objectionable basically talking about what she could be facing, things like that. So we prepared sort of alternate versions of that recording. One, we deleted that portion and, in fact, you can't even tell that there's been a deletion. It was done very well, I suppose, if that's the correct term. Any way (sic), so I've got both the original unedited and the one with that statement taken out, and *I talked to defense counsel about that*. My intention would be just to offer the edited version into evidence and to play that one and not worry about the original, but I wanted to bring that up sort of on the record if the Court or defense had a problem with that.

[Court]: Does that work for you, Mr. McFadden?

[McFadden]: It does, Your Honor.

Transcript at 279-80 (emphasis supplied).

there's going to be some sex, maybe not some sex. There is going to be some drugs, maybe some rock and roll. I don't know, but it's going to be interesting. This may be an interesting case.

In terms of how important it is in the grand scheme of things to our community or anybody's lives, I don't know. It didn't make the headlines in the newspaper to my knowledge. I don't know if it was reported. It may have been. But my defendant is charged with armed robbery.

Id. at 98. While all may not agree on the wisdom of said comments, their intent is clear. McFadden was trying to put the jury at ease and connect with the jury, as well as explain his action of jumping up in response to statements made by the State. These comments were a matter of strategy, and even if ill advised, we fail to see how the comments could rise to the level of ineffective assistance.

Sain claims further that McFadden improperly referred to her right to testify. In fact, she asserts that he "trampl[ed] on his own client's Fifth Amendment right not to testify." *Appellant's Brief* at 10. Again, we cannot agree.

During voir dire, McFadden made the following statement about a defendant's decision regarding whether to testify at trial:

And the last thing – going to this – the right of my client to testify, we haven't made a decision yet. It's long been part of our system of justice, you cannot be compelled to testify against yourself. And all I would say to those people is that if you – you got nothing to hide, you ought to tell your story, try to keep in mind this may happen to you some day or somebody you may know or love and privilege. And think about that privilege. It's another one of those things that shield us from the barrier of the government. We can say, you prove it, you prove it.

⁹ In response to McFadden's overzealous reaction, the trial court warned: "Counsel, drama doesn't work. You want to come up and talk to me, you can do that." *Id.* at 91. In the subsequent sidebar, the court indicated, "You're too high strung for me. If you have an objection, just tell me you want to object and come up and deal with it." *Id.* McFadden then acknowledged the court's concern and apologized.

Transcript at 101-02 (emphasis supplied). Sain would have us focus on the emphasized portion above without reading it in context. A fair reading of the entire excerpt reveals that counsel was expressing the fundamental importance of a defendant's right to decide whether to testify. When read out of context, the highlighted portion would certainly seem to indicate McFadden's opinion that a defendant should testify if they have nothing to hide – a curious belief for a defense attorney to express. It is clear, however, that this was not his message. Whether poorly articulated by counsel or transcribed incorrectly, it is evident that McFadden was responding to "those people" who would say, "if you—got nothing to hide, you ought to tell your story". *Id.* at 101. Therefore, we find no deficient performance in this regard.¹⁰

We now turn to Sain's primary complaint. That is, Sain claims McFadden told the jury during his opening and closing statements that she was guilty of the alleged crimes and should be convicted. Sain asserts counsel's closing statement was "more in line with a prosecutorial argument advocating for a conviction, rather than a defense attorney zealously advocating on behalf of his client." *Appellant's Brief* at 9. This is a clear misrepresentation of McFadden's arguments to the jury.

McFadden did not advocate for Sain's conviction of the charged crimes, as Sain would have us believe. Rather, McFadden made a strategic decision, in light of damning evidence against his client, to concede that Sain's behavior was indeed criminal, while

¹⁰ In passing, Sain also directs us to the concluding sentence of McFadden's closing argument in which he said, "I hope I've made some points on behalf of my client who chose not to testify, and I thank you." *Id.* at 337. Sain does not explain how this sentence amounts to ineffective assistance and directs us to no authority to support her apparent assertion.

arguing that she should not be convicted of armed robbery or residential entry. *See Hollins v. State*, 790 N.E.2d 100 (Ind. Ct. App. 2003) (strategic decisions generally do not support a claim of ineffective assistance), *trans. denied*.

In his opening statement, McFadden asked the jury to keep an open mind and further stated, in relevant part:

You know, essentially what [the prosecutor] just told you in a nutshell is kind of what happened. There's no doubt that this young lady committed a crime. And if that was as simple as that, you wouldn't be sitting here. So a crime was committed. And after all the evidence is concluded, I'm going to ask you to do the right thing and find her guilty. I mean you don't have to find her guilty of anything, but let's find her guilty of what she did – of what she's really guilty.

Transcript at 189. Thus, counsel commenced his defense strategy by suggesting to the jury that although his client committed a crime, she was not guilty *as charged*.

This was also the theme of his closing statement. Once again, Sain directs us to mere snippets of McFadden's argument to support her claim of ineffective assistance. A thorough review of his closing statement, however, reveals that McFadden zealously defended his client. After attacking Salina's credibility, McFadden argued in part:

Now, are these the actions of a woman who dropped some guy off after the Torch, just drops him off and comes back and bursts into the house and slaps him for no reason and says, where is my money? Where is my money? You heard the tape. You heard her confession. And it was not a true confession. You know, pretty clear she's hiding somebody, was hiding somebody. Because there were two people there that night besides herself. There was a black guy there with a shotgun.

...I don't think there's any contradiction of the evidence that Christa Sain returned to that house, was angry about something, had something to do with money, and that she believed that Rafael Salinas had taken it....

* * **

Now, to convict this young lady of arm (sic) robbery, the State has to prove that [she] knowingly or intentionally aided, caused or induced

another, either J.R. or the black guy, to commit armed robbery. They have to prove that she, beyond a reasonable doubt, induced these two men to commit armed robbery. It doesn't say robbery. It says armed robbery. Because there's a statute that says that it's a Class C Misdemeanor (sic) to take – to rob somebody by threat of force without a weapon. What makes it a B Felony is the weapon or the fact that someone is injured other than the defendant or that it's a substantial risk of injury from a weapon. And I may be misquoting law, and the Judge will probably instruct you on that.

So where is this proof that she told these guys to bring a gun and baseball bat? She told [the detective] that she wanted some backup. She walked in that house on her own to get her money back. She was upstairs alone with him, the defendant (sic) testified to that. She's alone in the house before these two guys come in the house. Then they go downstairs and then she says something or they allegedly say something about niggers or black people, and Mr. White guy and Mr. Black guy get out of the car.... And as [the prosecutor] indicated once the black guy came in with the gun and all of the – he took over. He's running the show now. He's got the gun. Where is the proof that she knew he had a gun, and where is proof that this particular time she was threatening anyone?

* * * *

In any event, to convict her beyond a reasonable doubt of armed robbery, -- and I would suggest you could probably convict her of robbery, I believe you have to find beyond a reasonable doubt that she aided or induced or told those men to come over there armed.... [I]f you find that she didn't know they were armed or there's a doubt in your mind as to whether or not she told them or induced them to bring weapons, then I believe you can find her guilty of robbery and not armed robbery....

Now, getting to the second charge, residential entry. The Judge is going to instruct you to convict the defendant of residential entry, you have to prove...beyond a reasonable doubt...the defendant...did knowingly break and enter the dwelling of Rafael Salinas. Well, there is no doubt that Christa Sain entered the dwelling of Rafael Salinas but did she knowing break? ...[T]he Judge is further going to instruct you that even the slightest force was used to gain entry. I would suggest to you that opening a door knob is not the slightest force. [The prosecutor], during voir dire, even mentioned you had to have some muscle. So is she guilty of residential entry? I suggest not. The door was unlocked constantly. People don't have a key to it. They didn't have keys to the house. The testimony was – the evidence was that she walked in the house and went upstairs.

As to Count III, the marijuana. Nobody is disputing that – that Ms. Sain possessed marijuana....

This trial probably has (sic) been as exciting as I promised you, it hasn't been as titillating. But you heard – you heard it. She confessed. I

mean she – she did something very, very, very stupid over money, over a lousy \$200.00. And does she regret what happened? Of course, she does. My goodness, she goes back to the house to try to apologize.

Did she working (sic) at the Torch? Yeah. Is that a good place to work? No, I'm sure her mother did not appreciate her working there. But she worked hard for her money. She was very upset about that money that night, if you believe the statements that she made to the detectives.

You know, you could find that she just went there to get her money and then all hell breaks loose with these other two guys. Did she intent (sic) to do that? Was that her intent? Did she – when she set this ball in motion, was it her intent to start an armed robbery? Was that – did she knowingly aid or induce or cause these guys to commit armed robbery? She wants a little muscle. The fact that two guys come in – to me, is that a show of force to threaten? Yeah. That's a fact. I mean you don't bring two guys along – she brought them for backup. She did.

Does she know they were armed? There's no evidence to suggest that she did. She entered that house by herself. These other two guys were across the street. All we know is that the telephone call (sic) made for some help. There's no evidence to say she was going to bring a gun or anything like that. She already knew these guys – or she probably knew one of them a heck of a lot better than she let on. I think you probably guessed that already.

She's trying to protect someone. And why – God only knows why young women – or women in general protect some of the guys they get involved with. It will never cease to amaze me. The things that people do to protect some person that is not worthy as Detective Moniz was trying to tell her. This – it's a rotten situation.

And I'm not blaming Mr. Salinas for this at all. But, you know what, I think he did steal her money, and I think he set this ball in motion.... There's no way it should have escalated to this point. But I think he did take her money. That's my opinion. My opinion. For this young girl to get so – just out of the blue to make this up....

....What happened was – was a serious matter. She recognized it immediately. But to say that she aided, induced and caused these guys to go in there with a weapon and commit armed robbery, I don't think so.

And I don't think that instruction the Judge is going to give you says that it's automatic either.... I suggest to you that as Mr. Fox and I-I said, I want to go over and beat up Joel, you want to come with me, backup. And I go over there and take a swing at Joel and Mr. Fox pulls out a shotgun and blows his head off, I'm responsible for that. I don't think the law says that.

We have previously recognized that concession by an attorney to certain elements of a charge or even to an entire charged offense may at times constitute a reasonable trial strategy. Christian v. State, 712 N.E.2d 4, 6 (Ind. Ct. App. 1999) ("[f]or instance, concession to a particular fact or charge that is supported by overwhelming evidence may help enhance a defendant's credibility on the remaining issues at trial"); Schick v. State, 570 N.E.2d 918, 927 (Ind. Ct. App. 1991) (defense counsel did not concede guilt on all the charges and, thus, "put the State's primary charges to a meaningful adversarial test"), trans. denied; see also U.S. v. Cronic, 466 U.S. 648, 656 (1984) ("[t]he right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing"). In light of the strength of the evidence against his client, we conclude that McFadden made a rational decision to concede that Sain was guilty of certain criminal behavior, but not armed robbery or residential entry. Thus, McFadden subjected the State's primary charges to meaningful adversarial testing.

While one may ponder why counsel did not seek an instruction on the lesser-included offense of robbery, as a class C felony, we observe that Sain has not directly argued that this failure amounted to ineffective assistance. Further, it appears probable that counsel made a strategic decision to argue that the State chose to charge Sain with armed robbery, not simple robbery, and that the State failed to prove this more serious charge.¹¹ Thus, counsel sought an outright acquittal on the robbery charge, as opposed to

In fact, counsel argued: "They have to prove that she, beyond a reasonable doubt, induced these two men to commit armed robbery. It doesn't say robbery. It says armed robbery." *Transcript* at 331.

a conviction on a lesser-included offense. This all or nothing defense is a recognized and accepted strategy. *See Autrey v. State*, 700 N.E.2d 1140 (Ind. 1998). Sain has not established that this strategy was unreasonable under the circumstances. Moreover, Sain cannot establish prejudice in light of the strong evidence presented at trial to support her conviction for armed robbery. *See id.* (finding ample evidence at trial to support murder conviction and, therefore, no prejudice in counsel's failure to seek instructions on lesser-included offenses); *see also Burris v. State*, 558 N.E.2d 1067 (Ind. 1990). The jury found Sain guilty of armed robbery beyond a reasonable doubt. Had the jury been instructed on the lesser-included offense, they would have been presented with the same evidence and heard the same testimony. Therefore, there is no reason to believe that the inclusion of the lesser-included offense would have raised a reasonable doubt as to her culpability for armed robbery. *See Autrey v. State*, 700 N.E.2d 1140.

In sum, Sain has failed to establish that she received ineffective assistance of trial counsel. Contrary to Sain's assertions on appeal, McFadden did not leave the jury with only the option of finding her guilty as charged. Although at times the defense was not

Sain attempts to liken this case to *Burris*. Burris's trial attorneys portrayed him in an unsympathetic light (as a street person and someone counsel did not even like), in direct contradiction of their stated strategy to try to humanize their client. *Burris v. State*, 558 N.E.2d 1067. Counsel also "seemed to convey that it would be personally inconvenient if the jury found his client guilty". *Id.* Our Supreme Court found these comments "reprehensible", yet found that in light of the strength of the evidence he would have been convicted of murder even in their absence. Id. at 1073. Therefore, the Court found no prejudice with respect to the guilt phase of Burris's trial.

In the instant case, unlike in *Burris*, counsel did not trivialize the importance of the case or make his client seem unsympathetic. On the contrary, McFadden portrayed Sain as a young lady who did something very stupid over money. He argued that Sain worked hard for her money and reacted impulsively when Salinas stole from her. Counsel argued that Sain was sorry for her actions and had no intention of committing armed robbery. He also portrayed Sain as foolishly taking responsibility upon her arrest in order to protect the men who brought the weapons. McFadden made a genuine attempt to garner the jury's sympathy for his client and his representation of Sain was nothing akin to the deficient representation addressed in *Burris*.

so eloquently presented, McFadden certainly put the State's primary charges to a meaningful adversarial test. Thus, the claim of ineffective assistance fails.

2.

Sain further claims the trial court committed reversible error in refusing to instruct the jury on the lesser-included offense of theft, a class D felony. Sain claims there was a substantial evidentiary dispute as to whether she committed theft as opposed to robbery.

When a defendant requests a lesser-included offense instruction, the trial court must apply a three-part analysis: (1) determine whether the lesser-included offense is inherently included in the crime charged; if not, (2) determine whether the lesser-included offense is factually included in the crime charged; and, if either, (3) determine whether a serious evidentiary dispute exists whereby the jury could conclude that the lesser offense was committed but not the greater. *Hauk v. State*, 729 N.E.2d 994 (Ind. 2000). The court should grant the defendant's request for a lesser-included offense instruction if it answers the third inquiry affirmatively. *Id*.

The State does not dispute that theft is an inherently lesser-included offense of robbery. *See Allen v. State*, 686 N.E.2d 760 (Ind. 1997). Theft requires the knowing or intentional exertion of unauthorized control over the property of another person with the intent to deprive the other person of any part of the property's value or use. I.C. § 35-43-4-2(a) (West 2004). Robbery consists of the same elements, as well as the use or threat of force on any person (in this case, while armed with a deadly weapon). I.C. § 35-42-5-1. The State charged Sain with robbery, but could have established that she committed

theft by proving the elements of robbery, less the use or threat of force. Therefore, theft is inherently included in a robbery charge. *See Hauk v. State*, 729 N.E.2d 994.

Because theft is inherently included in a robbery charge, we must determine whether a serious evidentiary dispute existed concerning the element distinguishing the two crimes -- use or threat of force -- whereby the jury could have concluded that Sain committed theft but not robbery. *Id.* On the record before us, there is no evidence of simple theft. See Allen v. State, 686 N.E.2d 760. It is apparent that Salinas's property was taken from his presence by the use or threat of force, as no property was taken until after the two men entered the home armed with a baseball bat and a shotgun. While Sain attempted to dispute whether she was acting in concert with the men and whether she knew they were going to be armed, we observe that this goes only to the question of whether she is guilty as an accessory to the crime charged. See Hauk v. State, 729 N.E.2d 994. Sain's defense that she personally did not engage in the use of force or intend for the men to be armed does not create an evidentiary dispute regarding whether force was used or threatened in the commission of this crime, and so does not entitle her to an instruction on theft as a lesser-included offense to her robbery charge. See id.

Judgment affirmed.

KIRSCH, C.J., and RILEY, J., concur.